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IN THE

SUPREME COURT OF THE UNITED STATES.

October Term, 1969.

No.

MICHAEL FRANCIS HAYNEY,

Petitioner,

vs.

THE STATE OF NEW JERSEY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY.

To the Honorable Chief Justice of the United States and Associate Justices of the Supreme Court of the United States:

The Petitioner, MICHAEL FRANCIS HAYNEY, respectfully represents:

OPINION BELOW.

The opinions of the trial court and appellate courts have not been reported. The trial court's opinion denying a Motion to Suppress, the opinion of the Superior Court of New Jersey, Appellate Division, and the Order of the Supreme Court of New Jersey are appended hereto.

JURISDICTION.

Jurisdiction is invoked under 28 U. S. C. §1257(3) for review of the Order of the Supreme Court of New Jersey dated and entered April 14, 1970, denying a Petition for Certification and review by that court of the judgment of the Superior Court of New Jersey, Appellate Division, entered February 2, 1970. The ground for jurisdiction is that the judgment of the State courts denied the Petitioner rights, privileges, and immunities claimed under the Constitution of the United States.

QUESTIONS PRESENTED.

The following questions are presented by this Petition for Writ of Certiorari:

1. Whether the rights of a person under the Fourth and Fourteenth Amendments to be secure against unreasonable search and seizure are violated by an officer's receiving telephone calls and testifying in a criminal proceeding as to the contents thereof where a search warrant for premises suspected of housing bookmaking and lottery practices is silent with regard to reception of telephone calls.

2. Whether the rights of a person under the Fourth and Fourteenth Amendments to be secure against unreasonable search and seizure are violated where a search warrant commands seizure of property used as a means of carrying on bookmaking and lottery practices, without further particular description on the ground that the warrant is too general and therefore void or that property not inherently used for an illegal purpose is seized and admitted into evidence in a criminal proceeding.

3. Whether the rights of a person under the Sixth and Fourteenth Amendments to be confronted with witnesses against him in a criminal proceeding are violated by a police officer testifying in a criminal proceeding paraphrases contents of telephone calls received in the course of a raid.

CONSTITUTIONAL PROVISIONS INVOLVED.

The Fourth Amendment to the Constitution of the United States provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Sixth Amendment to the Constitution of the United States provides, in pertinent part:

In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.

The Fourteenth Amendment to the Constitution of the United States provides, in pertinent part:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF CASE.

This case arises from Indictments #1034-67 and #1035-67 filed in the Superior Court of New Jersey, Law Division (Criminal), Camden County, on July 23, 1968. Indictment #1034-67 charged the offense of engaging as a messenger, clerk, and copyist in a place where lottery slips are kept and used, in violation of New Jersey Statute 2A:121-3(a). Indictment #1035-67 charged the offense of keeping a place to which persons might resort for gambling in violation of New Jersey Statute 2A:112-3.

The Indictments arose out of a raid made by four members of the New Jersey State Police on an apartment in Audubon, Camden County, New Jersey, on December 2, 1967, at about 2:30 p.m. The raiding officers, led by Investigator D. J. Novak, were executing a search warrant issued November 30, 1967, by the Honorable Frank J. Kingfield, Judge of the Superior Court of New Jersey, at

the application of Detective Sgt. Justin Dentino of the New Jersey State Police. The apartment was leased to the Petitioner, using the name Vincent Cuneo and he was present in the apartment, alone, at the time the raiding officers entered. The officers seized several items of property, giving the Petitioner a receipt therefor and two of the officers answered several telephone calls on the telephones in the apartment. After searching the premises the officers placed the Petitioner under arrest and, joined by members of the Audubon Borough Police Department, took him to the Audubon Police Station where he was formally charged.

Following indictment, the Petitioner entered pleas of not guilty to each indictment on August 9, 1968. A Motion to Suppress Evidence was made on September 5, 1968, in part based upon the grounds that the Petitioner's Fourth Amendment rights were violated by the seizure of property not particularly described in the search warrant and by reception or interception of telephone calls beyond the scope of the search warrant. The motion was heard by the Honorable Charles A. Rizzi, Judge of the County Court of Camden on October 4, 1968 and was denied in an oral opinion on the same date.

The indictments were tried before Judge Rizzi and a jury on November 7, 8, 12 and 13, 1968. The State introduced the testimony of five witnesses: the four State Policemen who participated in the raid and State Police Detective Sgt. Dentino, who testified as to his investigation prior to the raid and also testified as an expert on gambling practices. Several items of property seized in the course of the raid were introduced into evidence, including horse racing and football schedules with notations of results but no recording of bets. State Police Investigator Novak and State Police Trooper Stanley Lipski testified as to the substance of telephone conversations received, to the effect that the calls were seeking gambling information or placing

bets. The latter testimony was admitted over defense objections on the Fourth Amendment grounds previously presented in the Motion to Suppress and on the ground that such testimony violated the hearsay evidence rule and the accused's right to be confronted with witnesses against him. No defense testimony was introduced at trial.

The jury returned a verdict of guilty to each indictment. On February 7, 1969, Petitioner was sentenced by Judge Rizzi on Indictment #1035-67 to a term of one to two years in New Jersey State Prison and a fine of $1,000.00, and was sentenced on Indictment #1034-67 to a term of one to two years in New Jersey State Prison to run concurrently. The Petitioner took an appeal to the Superior Court of New Jersey, Appellate Division, filing the Notice of Appeal on February 9, 1969. That appeal was argued on January 26, 1970 and that court affirmed the judgments of conviction in an unreported opinion dated February 2, 1970. On February 4, 1970, the Petitioner filed a Notice of Petition for Certification in the Supreme Court of New Jersey. The latter court denied the Petition by its Order dated April 14, 1970.

ARGUMENT.

I.

The Petitioner's Fourth and Fourteenth Amendment Rights Were Violated by the Search and Seizure of Telephone Communications.

While present in the apartment during the course of the raid police officers answered a number of telephone calls. After denial of a Motion to Suppress such evidence, and

over objections made at trial, the officers testified regarding the content of those telephone conversations. The authority for the officers' presence on the premises was a search warrant issued November 30, 1967 which commanded in part, "enter into the said premises at Apartment #411 . . . and there diligently search the entire premises . . . and if you there shall find that the illegal practice commonly known as bookmaking or lottery is being conducted, take into your possession all property, including moneys, used as a means of carrying on the illegal practices commonly known as bookmaking and or lottery, which may be found, to the end that same may be dealt with according to law." The warrant did not by its terms authorize or command the officers to receive, answer, or intercept incoming telephone calls or to make any other use of the telephones.

The Fourth Amendment of the Constitution of the United States, made applicable to the States by the Fourteenth Amendment, required that the place to be searched and the things to be seized be described with particularity. The United States Supreme Court has stated, "The requirement that warrants shall particularly describe the things to be seized makes general searches under them impossible and prevents the seizure of one thing under a warrant describing another. As to what is to be taken, nothing is left to the discretion of the officer executing the warrant." *Marron vs. United States*, 275 U. S. 192, 196 (1927). More recently, the court reiterated this position adding, "The constitutional impossibility of leaving the protection of those (Fourth Amendment) freedoms to the whim of the officers charged with executing the warrant is dramatically underscored by what the officers saw fit to seize under the warrant in this case." *Stanford vs. Texas*, 379 U. S. 476, 485 (1965), where executing officers had seized numerous books, records, memoranda, and other instruments.

In recent years the U. S. Supreme Court has established the doctrine that the privacy of telephonic communication

is within the protection of the Fourth and Fourteenth Amendments. That position was enunciated in *Berger vs. New York*, 388 U. S. 41 (1967), where a state permissive eavesdrop statute was held unconstitutional because it failed to require a particularization of the place to be searched, the thing to be seized, and the specific crime involved. Electronic surveillance of a public telephone booth by federal officers without a warrant was held to be an unlawful search and seizure in *Katz vs. United States*, 389 U. S. 347 (1967). And then in *Lee vs. Florida*, 392 U. S. 378 (1968), the court overruled its former decision in *Schwartz vs. Texas*, 344 U. S. 199 (1952), which had held that the federal rule excluding evidence received in violation of Section 605 of the Federal Communications Act, 47 U. S. C. §605, was inapplicable to the states, making the federal rule now binding in state courts.

The recently enunciated federal protection in this area requires re-examination of the position taken by New Jersey State Courts with regard to admission of this type of evidence. Such examination must lead to the conclusion that the privacy of telephone communications requires that the activity of police officers in receiving telephone calls not be left to their discretion, but rather should be subject to independent judicial predetermination and be specifically authorized and limited in the search warrant if it is authorized at all. If the warrant in this case did purport to authorize the officers to receive or intercept all incoming telephone calls, it did so without any limitations or restriction on the officers' discretion, constituting in effect a general search of telephone communications invading the Petitioner's Fourth and Fourteenth Amendment rights and the warrant was to that extent void. If it did not authorize the receipt or interception of all calls it did not authorize any, and the officers exceeded the scope of the warrrant by such activity, also an invasion of the defendant's Fourth

and Fourteenth Amendment rights. In either event the evidence so obtained should have been suppressed.

II.

The Petitioner's Fourth and Fourteenth Amendment Rights Were Violated by the Seizure of Things Not Particularly Described in the Search Warrant.

The Fourth Amendment of the Constitution of the United States, made applicable to the States by the Fourteenth Amendment, requires that a search warrant describe with particularity the place to be searched and the things to be seized. It is mandatory that the things to be taken be set forth with sufficient particularity that nothing is left to the whim or discretion of the officers executing the warrant. *Stanford vs. Texas, supra.*

The Search warrant in the present case commands the search of Apartment #411 and directs that: "If you there shall find that the illegal practice commonly known as bookmaking and or lottery is being conducted, take into your possession all property, including moneys, used as a means of carrying on the illegal practice commonly known as bookmaking and or lottery which may be found." This description of things to be seized could conceivably cover a wide range of property, as many items in common usage for legitimate purposes could also be used as a means of carrying on the practice of bookmaking or lottery. Such an interpretation would leave the entire decision of what to seize to the whim of the executing officer, contrary to constitutional command, thus permitting the unlimited search of a general warrant. General warrants permitting a random search into a person's private books, letters, and papers in the hope of finding evidence of some crime have

long been condemned and were said to be one of the prime targets of the Fourth Amendment. *Boyd vs. United States*, 116 U. S. 616 (1886).

If this broad interpretation permitting the officers to seize any item that might possibly be used for the illegal practices described is given to the description of things to be taken, then the warrant is void and the search and seizure unlawful. In order to sustain the validity of the warrant a much narrower interpretation must be given to the description of property. In the absence of some showing that the items were actually in use as a means of carrying on the illegal practice alleged, those items not inherently unlawful should not have been seized. All of the items seized in the present case should therefore have been suppressed as evidence.

III.

The Petitioner's Sixth and Fourteenth Amendment Rights Were Violated by the Use of Indirect Testimony of Persons Not Present in Court.

Two State's witnesses testified at trial that as members of the raiding party they answered a number of telephone calls coming into the Petitioner's apartment. Over objections they paraphrased the content of telephone conversations, but were unable to identify the callers except to relate first names stated by some of the callers. The substance of the telephone conversations was offered to prove that persons outside the apartment called to place wagers with a person occupying the apartment and with the Petitioner specifically.

The Sixth Amendment to the Constitution of the United States made applicable to the States by the Fourteenth Amendment, guarantees the right of an accused to be con-

fronted with witnesses against him. An embodiment or application of that right is made in the hearsay evidence rule: "Evidence of a statement offered to prove the truth of the matter stated which is made other than by a witness while testifying at the hearing is hearsay evidence and is inadmissible except as provided . . ." Rule 63, Uniform Rules of Evidence, the rationale of the hearsay evidence rule is that "when a human utterance is offered as evidence of the truth of the fact asserted in which, the credit of the assertor . . . can be received only when made upon the stand, subject to the test of cross-examination . . ." 6 Wigmore, *Evidence* (3rd Ed.) Section 1766.

The general rule regarding admission of the content of telephone conversations is said to be that evidence of the fact of the making or receiving of a telephone call, as distinguished from evidence of the substance of the conversation offered to establish the truth or validity of the assertions made, is admissible. *Annotation, Admissibility of Evidence of Fact of Making or Receiving Telephone Calls,* 13 A. L. R. 2d 1409. If it were the State's aim to prove only the fact of receiving a number of calls this could be established without testimony of the content of the conversations. The only purpose of relating such content is to establish the truth of the statements made by the callers, that is, that they genuinely related to obtaining gambling information or to the placing of bets. Such testimony renders all of the unidentified callers witnesses against the Petitioner without permitting the Petitioner to be confronted by such witnesses for the purpose of cross-examining them or countering their testimony, and the admission of such testi-

mony was in violation of the Sixth and Fourteenth Amendments.

CONCLUSION.

For the reasons stated above, Petitioner prays that the Court grant a Writ of Certiorari to the Supreme Court of New Jersey.

Respectfully submitted,

JOSEPH W. CLARKE, JR.,
Counsel for Petitioner.

Appendix

ORAL OPINION DENYING MOTION TO SUPPRESS EVIDENCE.

CHARLES A. RIZZI, J. C. C., DELIVERED THE FOLLOWING ORAL OPINION:

I shall pass the first point and save that item for discussion. As to the third point of the three points that are raised by counsel on this motion and consider first the second point in which it is stated that the search and seizure was unlawful in that certain items and property and evidence seized were not such items as were described in the search warrant.

If it is to be assumed that the affidavit was sufficient to authorize the issuance of the search warrant, a consideration of the contents of the search warrant would disclose that the officer was commanded to seize all articles involved in the illegal practices commonly known as bookmaking and/or lottery that are found on the premises, that are the subject of the search warrant.

The objection here is that the specific items that were seized by the police officers are such as are not necessarily used for gambling or specifically for the types of gambling named lottery and bookmaking and that, therefore, their seizure was unlawful. These items as the inventory reads on the back of the search warrant consist of Armstrong race sheets bearing different dates of which one bore the then current date of December 2, 1967; weekly football news and schedules for the week through December 3, 1967; basketball and football schedules sheets dated December 1, 2, and 3, 1967; package of soluble paper and apartment lease, a deck of poker cards, a pair of dice—two pairs of dice, and

two public telephones bearing certain numbers which were named, as well as telephone call diverter equipment.

Now, it seems to the court that if there was a proper search warrant issued covering the alleged violations for bookmaking and/or lottery and some of these items having to do with bookmaking and lottery were found upon the premises then all of—then the seizure of all of these items were justified by reason of the well known law that when legal entry is made upon premises all contraband may be seized of whatever nature it may be and, therefore, the court is of the view that all of these items were properly seized by the searching officers.

The third argument has to do with the taking of telephone calls upon the premises, and it is urged that these telephone calls and their recording by the officers constituted an invasion of privacy in the violation of the Fourth Amendment of the United States Constitution.

The Court is of the view that these telephone calls were properly taken by the police officers and that there is not present here any invasion of constitutional rights. The Court is of the view first of all that these are not tangible items of evidence which can become the basis of a seizure motion, that the admissibility of these telephone calls are such as to be determined by the ordinary rules of evidence at the time of trial.

But notwithstanding that finding, the Court is of the view that if the officers were legally upon the premises pursuant to a valid search warrant that the taking of these telephone calls constituted a valid seizure if it was a seizure at all incidental to not only the arrest of the person found upon the premises but incidental to a valid seizure of the other items that would indicate the presence upon the premises of either bookmaking and/or lottery or both.

During the course of discussion, the Court mentioned a case and it seems to me that that case specifically held—

and that was the case of State versus Distazio, a decision by the New Jersey Supreme Court specifically held admissible telephone calls that were intercepted by police officers that had obtained legal admission to premises where it was alleged that a gambling operation was in effect and even to the extent that the court held that such evidence constituted evidence of bookmaking notwithstanding the fact that there was no other evidence admissible—that was introduced in the case by the State and the court upheld the conviction of a defendant for bookmaking based solely upon such testimony.

In any event, I now cite that case as being indicative of the finding of the New Jersey Supreme Court of the admissibility of such telephone calls. The Court is of the view that there is no invasion of privacy involved, there is no constitutional question involved, and that these telephone calls should not be suppressed, which is the sole request presently being made.

Now, going back to the first point that the search was unlawful and that the affidavit which was the basis for issuing the search warrant did not sufficiently state the facts to show probable cause that gambling activities were taking place in the subject premises. Judge Kingfield allowed this search warrant on November 30, 1967, based upon an affidavit bearing the same date of Detective Sergeant Justin Dintino of the New Jersey State Police who preliminarily stated that he had good reason to believe that certain illegal activities were being conducted upon specific premises; namely, apartment 411 of the Imperial House, 355 White Horse Pike, Audubon, New Jersey, occupied by one Charles Hampton, and he then proceeded to set forth the basis of his belief.

Among other things, he stated that he had obtained on November 4, 1967, reliable—strike "reliable," he had obtained information from a reliable informant that one

Charles Hampton was taking horse bets at telephone numbers and he gave the numbers involved which are the same numbers on the telephones that were seized upon the premises. He stated that his informant told him that he had dialed one of these numbers in the presence of Detective Dintino, that a male voice answered, that the informant said "Charlie, two dollars to win on Santo Domingo in the 8th at Aqueduct, and two dollars to win on Recall in the 8th at Garden State and one dollar on number 784."

Charlie said, "Okay" and both parties hung up. This was at 2:20 p.m. on the day in question.

He further stated that the telephone calls were made in such a way that he, Detective Dintino, could hear both sides of the conversation.

A check of the numbers in question according to his affidavit indicated that those numbers had been issued to one V. F. Cuneo at apartment 411, 355 White Horse Pike, Audubon, New Jersey, the premises in question. The affidavit proceeded to disclose similar telephone calls made on other days following November 4 by this informant in the presence of Detective Dintino at which time both horse bets and numbers play were passed on to the person identified as Charlie at one of the numbers indicated.

The officer further stated that the informer who had assisted him in obtaining his evidence had provided reliable information to him over a period of three years, that as a result thereof he had conducted seven gambling raids and there had been subsequent convictions in connection therewith.

He further set forth the specific information about the person identified as Charles Hampton coming from the informer who stated to him, Dintino, that he would meet Hampton once a week at a certain place here in Camden County where money changed hands.

Now, it was upon the basis of this affidavit that Judge Kingfield issued his search warrant. Certain points of law

should be considered in the appraisal of this affidavit in State versus Boyde, 4 N. J. 390. It was held that an affidavit in support of a search warrant is sufficient if recitals provide reasonable support or a belief of a prudent man that laws are being violated at a place reasonably identified and rigid and technical demands for elaborate specificability are not required.

And in State versus Tanzola reported in 83 New Jersey Super., page 40. The Appellate Division held that where one judge passes on another judge's issuance of a search warrant judgment of the issuing judge is ordinarily conclusive unless there was clearly no justification for issuing. The judge's conclusion is that the affidavit did, in fact, show probable cause.

Now, there has more recently been a decision by the New Jersey Supreme Court on this same subject; namely, State versus Kasabucki, 52 New Jersey, 110, in which Justice Francis speaking for a unanimous court made certain observations in search warrant cases.

Among other things, he stated that the Federal and State Constitutions do not bar all searches and seizures, they bar only those that are unreasonable. Citing cases he states further that a basic purpose of the framers of this important right was to protect the citizens against unwarranted invasion of his home by police officers. The intention was to impose an obligation on police officers, except in unusual situations, not to search a person's home unless they have presented their estimate of probable cause for the search warrant to the detached scrutiny of the neutral judge and obtained his formal authorization to do so.

Further that when the adequacy of the facts offered to show probable cause is challenged after a search made pursuant to a warrant and their adequacy appears to be marginal, the doubt should ordinarily be resolved by sustaining the search, citing United States versus Rentresa and

this is because the warrant provides clear evidence of the legitimacy of the officer's purposes.

The decisions then speak of the preferences accorded a search authorized after the facts and inferences therefrom had been subjected to neutral judicial consideration and found to constitute probable cause for it.

The Court further states that probable cause is a flexible non-technical consent. It includes a conscience balancing of the governmental needs for enforcement of the criminal law against the constitutional protected right of privacy.

Further that a finding of probable cause may rest upon evidence not competent at a criminal trial, and that hearsay is an adequate basis for the finding and the issuance of a warrant so long as there is something coupled with the hearsay to give it reasonable credit, something which gives it the appearance of trustworthiness.

Further that the warrant issuing judge's conclusion that the facts apply to him give rise to a well grounded suspicion that bookmaking existed at the designated address as a sensible and realistic one. The warrant supported search ought to be regarded as cloaked with an aura of prima facie legality.

A reviewing court should not apply a proof of guilt testified to affidavit only to reveal probable cause, only by utilizing such a wholesome approach can a reviewing court give leeway, give fair leeway to officer's honest evidence to administer the criminal law.

It seems to this court in view of the specific findings by the New Jersey Supreme Court in Kasabucki that recognition must be given to the opinion of Judge Kingfield as to the sufficiency of the affidavit and apart from that considering the affidavit on its face the court is of the view that there is ample basis for the search of the premises in question to have been justified.

For the reasons indicated it is determined that the search warrant as issued by Judge Kingfield on November 30,

1967, was issued upon sufficient evidence then before the court, and that the search warrant was, therefore, validly issued. For all of these reasons the motion to suppress is denied.

OPINION OF APPELLATE DIVISION.

Argued January 26, 1970—Decided February 2, 1970.

Before: JUDGES SULLIVAN, CARTON and HALPERN.

On appeal from Superior Court of New Jersey, Law Division, Camden County.

MR. ROBERT B. STITES argued the cause for appellant.
MR. I. MICHAEL HEINE, Assistant Prosecutor, argued the cause for respondent (Mr. A. Donald Bigley, Camden County Prosecutor, Attorney).

PER CURIAM.

Defendant was convicted of maintaining a gambling house (N. J. S. A. 2A:112-3), and sentenced to State's Prison for one to two years, and fined $1,000. He was also convicted of engaging as a messenger or clerk in connection with a lottery (N. J. S. A. 2A:121-3(a)), and sentenced to State's Prison for one to two years, to run concurrently

with the first sentence. He appeals from these judgments of conviction.

The jury could infer from the uncontested proofs that, pursuant to a search warrant, the police entered an apartment leased to defendant under a false name. Defendant was found on his knees, with his hands in two buckets of water, disposing of water soluble paper. The police seized lottery and bookmaking paraphernalia including football, basketball, and horse racing schedules; water soluble paper; bet notations; two telephones and telephone call diverter equipment; and the sum of $406.70 in cash.

While on the premises the police intercepted approximately 45 telephone calls, and their experts testified that the callers placed bets on horse racing, football, basketball, prize fights, and lottery numbers.

Defendant contends his constitutional rights were violated when the police intercepted the phone calls since such was not expressly authorized by the search warrant, and thereafter testified to the substance of such conversations. There is no merit to this contention. Interception of phone calls as part of a valid search and arrest, and permitting police to testify concerning their understanding of the messages, has long been approved. *State v. Carbone*, 38 N. J. 19 (1962); *State v. Campisi*, 49 N. J. 238, 240 (1967). The argument that this practice has been condemned by *Berger v. New York*, 388 U. S. 41 (1967) and *Katz v. United States*, 389 U. S. 347 (1967), is specious.

The search warrant directed the police to "take into your possession all property including monies, used as a means of carrying on the illegal practice commonly known as bookmaking and or lottery * * *." Defendant argues this description was too vague to support a constitutional search. We disagree. Considering the warrant "on a common sense basis rather than upon a super technical basis requiring elaborate specificity" as mandated by *State v. Daniels*, 46

N. J. 428, 437 (1966), the description of the place to be searched and the items to be seized meet constitutional requirements. *State v. Masco,* 103 N. J. Super. 277, 283 (App. Div. 1968).

Finally, defendant contends that insufficient evidence was presented to sustain a conviction under N. J. S. A. 2A:121-3(a) since no lottery slips, copies of numbers, or lists of lottery drawings were found. We hold that no such specific evidence is required to sustain a conviction. The jury could reasonably conclude that phone calls placing lottery bets were called in, and that defendant had recorded them on water soluble paper, but had destroyed them in the buckets of water. See *State v. DeStatsio,* 49 N. J. 247 (1967).

Affirmed.

ORDER DENYING PETITION.

(Filed Apr. 14, 1970.)

To Appellate Division, Superior Court:

A petition for certification having been submitted to this Court, and the Court having considered the same,

It is hereupon Ordered that the petition for certification is denied, with costs.

WITNESS the Honorable Joseph Weintraub, Chief Justice, at Trenton on the 14th day of April, 1970.

/s/ JOHN H. GILDEA,
Clerk of the Supreme Court.

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STATEMENT OF QUESTIONS PRESENTED

The following questions are presented by the Petition for Writ of Certiorari:

1. Whether a search warrant is sufficiently particular to authorize the executing officers to intercept telephone calls made to the premises during the course of the search where it contains the following authorization: "If you there shall find that . . . bookmaking and/or lottery is being conducted, take into your possession all property . . . used as a means of carrying on [that] illegal practice."

2. Whether the Sixth and Fourteenth Amendments are respected in prosecutions for lottery and bookmaking where State's witnesses testify as to the contents of telephone calls received in the defendant's premises during the course of a warranted search

OPINION BELOW: JURISDICTION:

CONSTITUTIONAL PROVISIONS INVOLVED

The respondent (State) adopts as its own the recitations under the above headings which the petitioner has included in his petition for writ of certiorari.

STATEMENT OF CASE

The indictments were tried before Judge Rizzi and a jury on November 7, 8, 12 and 13, 1968. The State introduced the testimony of five witnesses: the four State Policemen who participated in the raid and another State Police detective who testified as to his investigation prior to the raid and also testified as an expert on gambling

practices. In essence the testimony of the State's witnesses was that Apartment No. 411 was entered by breaking open the door. The defendant was found on his knees on the kicthen floor beside two buckets of discolored water, with one or both hands in the buckets. State Police detective Daniel J. Novak testified that the discoloration of the water in the buckets over which the defendant was kneeling was caused by the dissolving of water-soluble paper. The defendant was led into the living room, the search warrant was read to him, and he was advised of his right to remain silent.

In the kitchen there were two telephones; one was off the hook, the other ringing, and near them was a package of water-soluble paper. Novak answered the ringing telephone and answered a total of about fifteen calls during the raid. Trooper S. Lipski was assigned to take telephone calls and answered about 30 calls over a period of one to one and one-half hours. The callers, some of whom were anonymous, relayed betting information. State Police Detective Sergeant Justin Dintino, a man of sixteen years police experience, and at the time of the trial assigned to the State Police Intelliegnce Bureau, testified that on the "bank level" in the numbers system it is not unusual for a caller of a bet to omit his name because, and that as a result of daily contact, the listener knows his callers' voices.

Several items of property seized were introduced into evidence, including horse racing and football schedules with notations of results but no recording of bets. Investigator Novak and Trooper Lipski testified, over defense objections, as to the substance of the telephone conversations to the effect that the callers were seeking gambling information or placing bets. No defense testimony was introduced.

ARGUMENT

POINT I

A search warrant which provides that "if you there shall find that . . . bookmaking and/or lottery is being conducted, take into your possession all property . . . used as a means of carrying on [that] . . . illegal practice" is sufficient in its particularity to meet the standard of the Fourth Amendment, and is sufficient to authorize the executing officers to intercept telephone calls made to the premises during the course of the search.

Under the circumstances of the instant case, *i.e.*, the peculiar crime of bookmaking and the nature of the instrumentalities incident to its perpetration, the search warrant which issued was proper under the principles of federal and local law in both its form and execution. Recognizing the Fourth Amendment proscription against general searches to be irreproachable in purpose, *see, e.g.*, Lord Camden's opinion in *Entick v. Carrington*, 19 Howell St. Tr. 1029 (1765), discussed in *State v. Bisaccia*, 45 N.J. 504 (1965), nevertheless, the issue as to whether a search meets that standard must be resolved on the particular facts of the case; "there are no rigid rules." *State v. Daniels*, 46 N.J. 428, 436 (1966).

The scope of a search warrant is delimited by two sets of criteras; namely, description of the premises, and description of the items to be seized. Admittedly, both of those mandates are imposed because of society's determined effort to protect privacy from capricious invasions which might result if the scope of initially necessitated searches were left to the subjective discretion of zealous

law enforcement personnel. *See Stanford v. Texas*, 379 U.S. 476, (1965) (which added that when literature is seized because of contained ideas, it must be described with "scrupulous exactitude").

With respect to the consideration of description of premises, state and federal cases recognize:

> It is enough if the description is such that the officer with a search warrant can, with reasonable effort, ascertain and identify the place intended.
>
> See, *e.g.*, *Steele v. United States*, 267 U.S. 498 (1924); *State v. Daniels, supra*, at 436.

The element of description of things to be seized would appear to be controlled by the same standard. *See, e.g., State v. Seefeldt*, 51 N.J. 472 (1968), where the Court, with respect to a description in a search warrant, held that the words "'weapons used in the crime of murder' . . . were of adequate specificity to eliminate any room for the exercise of discretion by the searcher as to the items to be seized". *Id.* at 490.

The defendant draws in issue the general sufficiency of the description of the items to be seized and the particular inclusion within the warrant's language of telephone calls. The doctrines discussed above venerate the sufficiency of the warrant on both issues. See, *e.g., State v. Masco*, 103 N.J. Super. 277 (App. Div. 1963), relying upon *Steele v. United States*, 267 U.S. 498 (1924) and *Stanford v. Texas*, 379 U.S. 476 (1965), which held that the description "bookmaking paraphernalia" was not only sufficiently precise, but also that:

> A telephone is an indispensable facility for a bookmaker . . . and as such obviously must be included

> in the description. . . . In this search for evidence to establish defendant's complicity in the crime they could lawfully receive such calls.
>
> *State v. Masco, supra,* at 283.

The *Masco* decision tacitly recognizes that every crime has its personal accoutrements, which, depending on the situation, may or may not be described with a single word. Although a gun may be aptly described by the word gun, unfortunately the instruments of bookmaking may not of necessity have that same intrinsic identifiability. It is important that the words used conjure a sufficient Gestaldt in the minds of the executing officers. The rule of the Fourth Amendment is "reasonableness," *State v. Daniels, supra,* at 437, and it is not to be measured by "formalisms of no vital importance." *Id.*

Because the officers were authorized to seize the particular telephone calls related to bookmaking, they were indeed authorized to intercept all calls which came into the apartment during the circumscribed time incident to their search. That was as much a part of the authorized scope of the search as "cellars, broom closets, hallways, storage areas" are within the authorized scope of a search warrant directing the search of "such areas as are under the custody and control of a superintendent of . . . building . . .". *Cf. State v. Sheppard,* 46 N.J. 526 (1966). See also *State v. Carbone,* 38 N.J. 19, 22 (1962).

Within this framework it cannot be said that the interception of the defendant's telephone calls violated either the letter or spirit of *Berger v. New York,* 388 U.S. 41 (1967), or *Katz v. United States,* 389 U.S. 347 (1967). Here we have, as contradistinguished from the facts in those cases, a narrowly circumscribed "surveillance" – if that term is appropriate here – which was authorized by a

Superior Court judge who was notified of the need for the search. *Katz*, 389 U.S. at 354. Moreover, the case at bar does not present a surreptitious eavesdropping which was the subject of the Court's consternation in those decisions.

Point II

In prosecutions for lottery and bookmaking testimony of police officers as to bets placed by telephone callers to the defendant's premises are admissible as non-hearsay extra-judicial statements offered to prove the calls as operative facts.

In bookmaking and lottery prosecutions testimony as to incoming telephone calls received by police officers during the course of a search have been traditionally admitted into evidence. See, *e.g.*, *State v. Masco*, *supra*, at 283, and the cases cited therein. Although less than explicit as to the justification and theory of admissibility, those decisions comport with sound evidential theory.

The defendant wrongly characterizes the testimony of the police officers as hearsay; that is, as extra-judicial statements offered to prove the truth or falsity of the facts asserted which deny the accused the right to confront his accusers. *McCormick, Law of Evidence*, 460 (1954); *New Jersey Rule of Evidence* 63. Properly construed, the calls were offered to prove the calls themselves as operative facts. When viewed in light of that purpose, the evidence is without the proscription of the hearsay exclusion. *McCormick*, *supra*, at 463. See, *e.g.*, *Commonwealth v. Wiswesser*, 134 Pa. Super. 488, 3 A. 2d 983 (1939) (testimony as to defendant's agent to juror not hearsay in a prosecution for solicitation of juror). Indeed, this concept is embodied in

annotation to *New Jersey Evidence Rule* 63 prepared by the Rules of Evidence Study Commission. It provides:

> Evidence that the owner of a car gave instructions to a driver is not hearsay if offered to prove agency; but it would be hearsay if the content of the instructions related to delivery, and were offered to prove delivery.

To interpose: evidence that a hopeful bettor gave a bet to a bookmaker is not hearsay if offered to prove bookmaking; but it would be hearsay if the content of the message related to a specific horse-race and were offered to prove the existence of same. See also *Fentron Architectural Metals Corp. v. Romagnino*, 69 N.J. Super. 410 (App. Div. 1961), *cert. den.*, 36 N.J. 297 (1962).

CONCLUSION

The decisions below rested upon both prevailing constitutional doctrine as well as specific local decisions which have considered the problems with not only constitutional sensitivity but with greater particularity. Accordingly, on the basis of the authorities advanced as applied to the record below the respondent prays that the petitioner's Writ of Certiorari be denied.

Respectfully submitted,

/s/ James Greenberg
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